Husli bin Mok & Ors v Probate Officer, Miri

HIGH COURT (MIRI) — ORIGINATING MOTION NO 25-8-95 (MR)
RICHARD MALANJUM J
30 NOVEMBER 1995

Administrative Law *— Remedies — Certiorari — Application to quash decision of Probate Officer — Whether decision made according to law — Whether decision based on relevant matters*

Administrative Law *— Remedies — Mandamus — Conditions to be satisfied — Specific Relief Act 1950 s 44*

Succession *— Letters of administration — Refusal of grant — Application for certiorari to quash decision of Probate Officer — Whether remedy available*

Words and Phrases *— 'Assets' — Sarawak Administration of Estates Ordinance (Cap 80) s 3*

On 30 March 1995, the first applicant with the agreement of the other applicants, applied to the respondent for the issue of the grant of letters of administration in order for him to administer the estate of one Mok bin Tuah ('the deceased'). However, by a letter dated 24 July 1995 ('the letter of 24 July 1995') which was signed by one William Nyalau for the District Officer, Miri ('the respondent'), the request of the first applicant was not entertained ('the decision'). The applicants then obtained leave to apply for a judicial review of the decision. In the present application, the applicants applied for an order of certiorari to quash the decision and an order of mandamus requiring the respondent to issue the grant of letters of administration to the first applicant. The issues that required consideration were: (i) whether the decision was made according to law and if not, whether it should be quashed; and (ii) whether an order of mandamus should follow. The applicants contended that the said decision should be quashed as it was, inter alia, made in breach of the rules of natural justice; that it was exercised at the behest of another and not by the respondent himself; that the respondent was biased in favour of the State Government; and that in making the decision the respondent took into account irrelevant matters and/or failed to consider relevant matters. Learned counsel for the applicants also contended that under the Sarawak Administration of Estates Ordinance (Cap 80) ('the Ordinance'), the task of the Probate Officer should be divided into two stages, namely (1) to decide whether an applicant was eligible or qualified for the letters of administration; and (2) if so, and when s 5 of the Ordinance had been satisfied, to issue the letters of administration. It was argued that only stage (1) provided the respondent with a discretion in view of s 9 of the Ordinance. Otherwise once an applicant was entitled to the letters of administration under s 8 of the Ordinance, and s 9 had not been invoked, and the necessary affidavit and inventory had been filed and estate duty, if

any, paid, the respondent must grant the application. Counsel for the respondent in opposing the application, inter alia, argued that s 3(a) of the Ordinance was not satisfied as the deceased had not left any assets within the district.

Held, allowing the application:

(1) Before issuing the letter of 24 July 1995 and consequently the decision, there was no opportunity given to the first applicant to state his case in view of the letter from the Lands and Surveys Department which was relied upon in the decision. The decision therefore was not made according to law as the applicant was not given the opportunity to rebut its contents (see p 429A–C); *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 and *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 followed.

(2) Furthermore, the letter of 24 July 1995 indicated that the decision was not made by the respondent on his own as the respondent, at no time, stated that he had delegated his power (see p 429D); *Bromley LBC v Greater London Council & Anor* [1982] 1 All ER 129 followed.

(3) The respondent should have confined his decision to the provisions of the Ordinance and not considered extraneous matters which the applicants did not even have the opportunity to rebut. There was also no satisfactory explanation as to why the position of the State Government should have been given any consideration as the matter before the respondent was only an application for the issuance of the grant of the letters of administration, and not an action against the State Government. Certiorari therefore should be granted as the decision reflected that irrelevant matters had been taken into account (see p 429G–I); *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680 followed.

(4) An applicant for the grant of the letters of administration must be within the category stipulated in s 8 of the Ordinance. In this case, the first applicant, being the male heir of the deceased and duly authorized by the other heirs, clearly met this requirement. In the absence of any opinion of the respondent as to the first applicant's fitness to act as provided for under s 9 of the Ordinance, the first applicant was therefore entitled to the grant of the letters of administration to administer the estate of the deceased (see p 433H–I).

(5) If an applicant had complied with all the requirements as provided for under the Ordinance and the respondent had not invoked s 9, then the respondent had no alternative but to grant the application (see p 434B–C); *Tan Hee Lock v Commissioner for Federal Capital & Ors* [1973] 1 MLJ 238 followed.

(6) Althought the definition of 'assets' is not found in the Ordinance, the right to sue, being a chose in action, is an asset (see p 432E–I); *King Hock Ching v Ung Siew Ping* [1974] 2 MLJ 16 followed; *Re Hee Chun Meng* [1989] 2 MLJ 310 distinguished.

(7) Before the order of mandamus could be issued, s 44 of the Specific Relief Act 1950 must be satisfied. In this case all five conditions had been satisfied (see p 433E).

[Bahasa Malaysia summary

Pada 30 Mac 1995, pemohon pertama dengan persetujuan pemohon-pemohon lain telah memohon kepada penentang supaya mengisukan geran surat kuasa pentadbiran harta pusaka untuk membolehkannya mentadbir harta pusaka seorang Mok bin Tuah ('simati'). Walau bagaimanapun, menurut surat bertarikh 24 Julai 1995 ('surat 24 Julai 1995 itu') yang ditandatangani oleh seorang William Nyalau untuk Pegawai Daerah, Miri ('penentang'), permohonan tersebut telah ditolak ('keputusan tersebut'). Pemohon kemudiannya memperolehi kebenaran untuk memohon kajian semula kehakiman keputusan tersebut. Di dalam permohonan sekarang ini, pemohon memohon satu perintah certiorari untuk membatalkan keputusan tersebut dan satu perintah mandamus untuk mengarahkan penentang mengisukan geran surat kuasa pentadbiran harta pusaka kepada pemohon pertama. Isu-isu yang memerlukan pertimbangan adalah sama ada: (i) keputusan tersebut telah dibuat menurut undang-undang dan jikalau tidak, sama ada ia harus dibatalkan; (ii) sama ada perintah mandamus selanjutnya harus dikeluarkan. Pemohon-pemohon telah menghujahkan bahawa keputusan tersebut patut dibatalkan kerana ia, antara lainnya, telah dibuat melanggar kaedah-kaedah keadilan asasi; bahawa perintah tersebut telah diisukan oleh orang lain dan bukannya oleh penentang sendiri; bahawa penentang memihak kepada Kerajaan Negeri; dan bahawa dalam membuat keputusan tersebut, penentang telah mengambil kira perkara-perkara yang tidak relevan dan/ataupun meninggalkan perkara-perkara yang relevan. Peguam pihak pemohon juga telah menghujahkan bahawa di bawah Ordinan Pentadbiran Harta Pusaka Sarawak (Bab 80) ('Ordinan tersebut'), tugas Pegawai Probet haruslah dibahagikan kepada dua tahap, iaitu (1) untuk memutuskan sama ada pemohon adalah layak untuk mendapatkan surat kuasa pentadbiran tersebut; dan (2) jikalau begitu, dan di mana s 5 Ordinan tersebut dipatuhi, untuk mengisukan surat kuasa pentadbiran tersebut. Telah dihujahkan bahawa hanya tahap (1) sahaja yang memberikan penentang budi bicara memandangkan s 9 Ordinan tersebut. Jikalau tidak, sebaik sahaja pemohon adalah berhak mendapatkan surat kuasa pentadbiran tersebut di bawah s 8 Ordinan tersebut, dan s 9 tidak digunakan, dan afidavit dan inventori yang diperlukan telah difailkan dan duti estet, jikalau ada, sudah dibayar, penentang harus membenarkan permohonan itu. Peguam penentang dalam membantah terhadap permohonan tersebut telah menghujahkan bahawa s 3(a) Ordinan

tersebut tidak dipatuhi kerana simati telah tidak meninggalkan sebarang aset dalam daerah yang berkenaan.

Diputuskan, membenarkan permohonan itu:

(1) Sebelum mengisukan surat 24 Julai 1995 itu, dan seterusnya membuat keputusan tersebut, tidak ada peluang yang diberikan kepada pemohon untuk menyatakan kesnya memandangkan surat daripada Jabatan Tanah dan Ukur Tanah yang digunakan dalam membuat keputusan tersebut. Maka keputusan tersebut telah tidak dibuat menurut undang-undang kerana pemohon telah tidak diberi peluang untuk mematahkan kandungan surat tersebut (lihat ms 429A–C); *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 dan *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 diikut.

(2) Tambahan pula surat 24 Julai 1995 itu menunjukkan bahawa keputusan tersebut telah tidak dibuat oleh penentang sendiri kerana penentang langsung tidak menyatakan bahawa dia telah mewaliki kuasanya (lihat ms 429D); *Bromley LBC v Greater London Council & Anor* [1982] 1 All ER 129 diikut.

(3) Penentang sepatutnya harus membuat keputusan berdasarkan peruntukan-peruntukan Ordinan tersebut sahaja dan bukannya berdasarkan perkara-perkara luar yang tidak dapat disangkal oleh pemohon. Lagipun tiada penjelasan memuaskan yang diberikan untuk menerangkan mengapa kedudukan Kerajaan Negeri telah diberi pertimbangan, memandangkan bahawa perkara di hadapan penentang adalah permohonan untuk mengisukan geran surat kuasa pentadbiran sahaja, dan bukannya suatu tindakan terhadap Kerajaan Negeri. Maka certiorari harus diberikan kerana keputusan tersebut telah mencerminkan bahawa perkara-perkara yang tidak relevan telah diambil kira (lihat ms 429G–I); *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680 diikut.

(4) Pemohon geran surat kuasa pentadbiran haruslah berada dalam kategori seperti yang dinyatakan dalam s 8 Ordinan tersebut. Dalam kes ini, pemohon pertama yang merupakan waris lelaki simati dan yang diberi kuasa dengan wajarnya oleh waris-waris yang lain, telah dengan jelasnya memenuhi peruntukan tersebut. Selagi tidak ada sebarang pendapat oleh penentang berkaitan dengan keupayaan pemohon pertama untuk bertindak menurut s 9 Ordinan tersebut, maka pemohon pertama adalah berhak mendapat geran surat kuasa pentadbiran tersebut untuk mentadbirkan harta pusaka simati (lihat ms 433H–I).

(5) Jikalau pemohon telah memenuhi kesemua peruntukan seperti yang diperuntukkan di bawah Ordinan tersebut dan penentang telah tidak menggunakan s 9, maka penentang tidak ada alternatif selain daripada membenarkan permohonan tersebut (lihat ms 434B–C); *Tan Hee Lock v Commissioner for Federal Capital & Ors* [1973] 1 MLJ 238 diikut.

(6) Walaupun takrif 'aset' tidak didapati dalam Ordinan tersebut, hak untuk mendakwa, yang merupakan satu hak dalam tindakan, adalah dianggap sebagai aset (lihat ms 432E–I); *King Hock Ching v Ung Siew Ping* [1974] 2 MLJ 16 diikut; *Re Hee Chun Meng* [1989] 2 MLJ 310 dibeza.

(7) Sebelum perintah mandamus dapat diisukan, keperluan s 44 Akta Relief Spesifik 1950 hendaklah dipenuhi. Dalam kes ini kesemua lima syarat telah dipatuhi (lihat ms 433E).]

Notes

For cases on remedies in administrative law, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–133.

For cases on letters of administration in succession, see 11 *Mallal's Digest* (4th Ed) paras 1681–1682.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680

Bromley LBC v Greater London Council & Anor [1982] 1 All ER 129

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114

Hee Chun Meng, Re [1989] 2 MLJ 310

King Hock Ching v Ung Siew Ping [1974] 2 MLJ 16

Ong Ah Ngim v Lau Kiok Kia [1956] SCR 7

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364

Tan Hee Lock v Commissioner for Federal Capital & Ors [1973] 1 MLJ 238

Legislation referred to

Sarawak Administration of Estates Ordinance (Cap 80) ss 3(a), 5, 8, 9, 17

Probate and Administration Act 1959 s 2

Specific Relief Act 1950 s 44

MS Sandhu (*MS Sandhu & Co*) for the plaintiffs.

Abdul Rahman Sebli (Senior Legal Officer) for the defendant.

Richard Malanjum J:

INTRODUCTION

On 7 September 1995, I granted leave to the applicants to apply for orders of certiorari and mandamus in relation to the refusal of the respondent to issue the grant of letters of administration to the first applicant to administer the estate of the late Mok bin Tuah. The first applicant was duly authorized to do so by the other applicants. Pursuant to that leave, the applicants by notice of motion dated 15 July 1995 (encl 9) sought for the following orders:

(1) An order for certiorari to remove into this honourable court for the purpose of it being quashed the decision of the Probate Officer, Miri (also the District Officer, Miri) contained in his letter dated 24 July (sic) 1995 (Ref (50)/DOQ/14/6) refusing the grant of letters of administration to be issued to Husli @ Husly bin Mok to administer the estate of Mok bin Tuah, deceased.

(2) An order for mandamus requiring the respondent to issue the grant of letters (sic) of administration to Husli @ Husly bin Mok to administer the estate of Mok bin Tuah, deceased.

(3) Such order be made on costs as the court deems just.

In support of their application the applicants filed and referred to the following affidavits:

(1) the affidavit of Husli @ Husly bin Mok affirmed on 28 August 1995 (encl 2) whose affidavit was also relied upon when applying for leave;

(2) the supplementary affidavit of Husli @ Husly bin Mok affirmed on 4 September 1995 (encl 4); and

(3) the further affidavit of Husli @ Husly bin Mok affirmed on 3 October 1995 (encl 17).

In opposing the application, the respondent filed the following affidavits:

(1) the affidavit of Sapawi Mustapha Hj Shibli affirmed on 28 September 1995 (encl 15); and

(2) the affidavit of Charles Arthur Bateman sworn on 30 September 1995 (encl 13).

I heard the application on 9 and 10 October 1995 and at the conclusion of the hearing I granted prayers (1) and (2) afore-mentioned. In granting the orders, I indicated that I would give the grounds in the event of an appeal. As the respondent had filed a notice of appeal on 6 November 1995, these are therefore the grounds of my decision.

THE UNDISPUTED FACTS

The following were undisputed facts by way of admission or lack of rebuttal:

(1) that Mok bin Tuah ('the deceased') is dead;

(2) that the first applicant is the male heir of the deceased;

(3) that the deceased died intestate on 15 June 1981;

(4) that on 30 March 1995 the first applicant with the agreement of the other applicants, applied to the respondent for the issue of the grant of letters of administration in order for him to administer the estate of the deceased;

(5) that in making the application, the first applicant submitted a letter from his advocates, Messrs MS Sandhu & Co together with the following documents:

(a) the death certificate of the deceased;

(b) the temporary identity card of the first applicant;

(c) the affidavit of the first applicant affirmed on 29 March 1990 ('the affidavit of 29 March 1990') together with the inventory; and

(d) the surat wakil of the other applicants.

(6) that it was stated in the inventory that the asset involved was (verbatim) 'action to claim for "temuda"/native customary rights' in the following lands:

Lot 1352 Block 4 Miri Concession Land District,
Lot 1353 Block 4 Miri Concession Land District,
Lot 1354 Block 4 Miri Concession Land District,
Lot 1355 Block 4 Miri Concession Land District,
Lot 1359 Block 4 Miri Concession Land District,
Lot 1350 Block 4 Miri Concession Land District ('the lands'); and

(7) that by a letter dated 24 July 1995 ('the letter of 24 July 1995') signed by one William Nyalau for the District Officer, Miri ('the respondent'), the request of the first applicant was not entertained for the reasons stated therein.

THE ISSUES

After hearing the submissions of learned counsel for the parties and basedon the materials before me, the issues that required consideration were as follows:

(1) whether the decision ('the decision') of the respondent in refusing to issue the grant of letters of administration vide the letter of 24 July 1995 was made according to law and if not, whether it should be quashed; and

(2) whether an order of mandamus should follow.

ISSUE 1

The contentions

Briefly, the applicants contended that the decision should be removed into this court to be quashed for the following reasons:

(1) that it was made in breach of the rules of natural justice;

(2) that 'it was exercised at the behest of another and not by the respondent himself';

(3) that the respondent was biased in favour of the state government;

(4) that the exercise of the power was unreasonable;

(5) that in exercising the power, the respondent did so for an improper purpose, to wit, to safeguard the interests of the State Government;

(6) that in making the decision, the respondent took into account irrelevant matters and/or failed to take into account relevant matters; and

(7) that the decision was coloured by policy considerations and not on the merits of the case.

I should think that items (4) to (6) could be dealt with together.

And in submitting for the applicants, learned counsel argued, inter alia:

(1) that in coming to the decision, the respondent referred to the letter from the Lands and Surveys Department, Miri (exh SMHS2 of encl 15) but without considering the contents of that letter. The first applicant was also not given the opportunity to explain his reasons for applying for the issue of the grant of the letters of administration, particularly in the light of the official record of the Lands and Surveys Department pertaining to the claim of the deceased for native customary rights on the lands;

(2) that in coming to the decision, the respondent took into account irrelevant matters and/or omitted the relevant matters. Learned counsel cited the following as irrelevant matters which were however considered by the respondent, namely:

(a) that the lands were not documented;

(b) that the lands were State Land;

(c) that the issuance of the grant of letters of administrationwould jeopardize the interest of the state government of Sarawak and would be a defendant in the event of an action being taken; and

(d) that policy considerations were relied upon.

According to learned counsel for the applicants, the relevant matters which were omitted were as follows:

(a) that the claim was for 'temuda';

(b) that what was included in the inventory was sufficient for the issuance of the grant of the letters of administraion; and

(c) that the applicants, being the beneficiaries of the estate of the deceased, should be entitled to claim for native customary rights on the lands.

(3) that there was an unreasonable exercise of power as the discretion of whether to issue the grant of letters of administration was not exercised by the respondent. Further, there was no power to delegate under the Administration of Estates Ordinance (Cap 80) ('the Ordinance'). Yet in this case the decision as contained in the letter of 24 July 1995 was signed by En William Nyalau and not by the respondent as the Probate Officer;

(4) that the decision was made at the behest of another and as such the discretion of the respondent was not exercised by him personally.

Such conclusion could be made due to the use of the phrase 'I am directed to advise you that my office' in the letter of 24 July 1995; A

(5) that the official records of the Lands and Surveys Department would have shown the claim of the deceased on the lands;

(6) that the letter of 24 July 1995 appeared to ignore or contradict the letter from the Lands and Surveys Department; B

(7) that in making the application to the respondent, the first applicant included in the inventory the action to claim for 'temuda'/native customary rights to the lands which should have been sufficient for the purpose of applying for the issuance of the grant of the letters of administration; and C

(8) that the native customary rights on the lands were never extinguished and thus the question of time bar did not arise.

In opposing the application, learned counsel for the respondent, En Abdul Rahman Sebli, the senior legal officer from the State Attorney General's Chambers, contended, inter alia: D

(1) that the jurisdiction of the respondent to issue the grant of the letters of administration was limited to an estate of a deceased person leaving assets within the district. In this case there was no evidence of assets being left by the deceased;

(2) that the applicants had no locus standi to apply for the issuance of E the grant of the letters of administration in view of s 8 of the Ordinance; and

(3) that the letter of 24 July 1995 indicated that En William Nyalau was directed by the respondent, as the District Officer, to advise the first applicant that he (the District Officer) could not accede to his F request.

In the course of his submissions, En Abdul Rahman indicated that he had no serious objection for the order of certiorari to be issued if the order of mandamus did not follow. And in contending that an order of mandamus should not follow, En Abdul Rahman argued that this court was not in the G position to decide the rights of the parties. He went on to submit that before the order of mandamus could be issued, s 44 of the Specific Relief Act 1950 ('the Act') must be satisfied. According to learned counsel, in this case the conditions of the said section had not been satisfied in that thre was no evidence that assets were left by the deceased within the meaning of s 3(a) of the Ordinance. Thus, the applicants lacked the H standing to apply. It was also contended that the purpose of applying for the issuance of the grant of the letters of administration was to enforce the satisfaction of a claim against the State Government and that could not comply with s 44(2)(b) of the Act.

And finally, En Abdul Rahman submitted that the legal right of the I applicants in this case to have the act performed, was not clear and not well-defined, and thereby not free from reasonable controversy. As such the order of mandamus should not be issued.

The finding

It was my finding that the order of certiorari should be issued as the decision was not made according to law. I came to that conclusion based on the materials and arguments as presented before me, including the concession made by En Abdul Rahman. It was obvious that before issuing the letter of 24 July 1995 and thus the decision, there was no opportunity given to the first applicant to state his case in view of the letter from the Lands and Surveys Department which was referred thereto. The said letter from the Lands and Surveys Department was obviously relied upon in the decision; yet the first applicant was not given the opportunity to rebut its contents before the decision was made. Such a course of action taken by the respondent, in my view, did not comply with the settled principle of law applied in our courts (see *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364).

Furthermore, the letter of 24 July 1995 appeared to indicate that a direction came from somewhere as was contended by learned counsel for the applicants and not a decision made by the respondent on his own (see *Bromley LBC v Greater London Council & Anor* [1982] 1 All ER 129). I could not agree with the interpretation of the said letter as given by En Abdul Rahman. If indeed En William Nyalau was directed by the District Officer, then there would have been no need for him to sign the letter 'for District Officer'. Otherwise it would be a ridiculous situation in that it would appear that the District Officer was directing himself. Alternatively, the Ordinance does not provide for the delegation of power by the Probate Officer. In fact in his affidavit (encl 15) the respondent at no time stated that he had delegated his power to En William Nyalau. Instead, he assumed the decision to be his; but that would only strengthen the interpretation of the said letter as given by learned counsel for the applicants. Anyway, if in fact he had delegated, then that decision could not be maintained as it could be said that there was no decision made.

The fact that the decision reflected irrelevant matters being taken into account, was another reason why the order of certiorari should be granted (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680). There was no reason for the respondent, while acting as such, to consider matters which he might only do so if he were to consider them as a District Officer. He should confine his decision to the provisions of the Ordinance and not consider extraneous matters which the applicants did not even have the opportunity to rebut. I found no satisfactory explanation as to why the position of the State Government should be given any consideration, as the matter before the respondent was only an application for the issuance of the grant of the letters of administration and not an action against the State Government. Obviously, the respondent took a pre-emptive strike which I viewed as being unfair and unreasonable in the circumstances. In so doing the applicants were prevented from crossing the first hurdle in their pursuit to claim the 'temuda'/native customary rights on the lands through the estate of the deceased. And there was also no legal justification presented that the

respondent was correct to assume that since the lands were not documented, no claim could be made. The fact that it was only an intended action to claim for 'temuda'/native customary rights on the lands, was not considered. There was also no basis for the respondent to say that the lands (verbatim) 'are state land as confirmed by the Land and Survey Department, Miri'. The letter from the said department (SMHS2 of encl 15) did not state as such.

On the other hand, it should have been considered that it was sufficient for the first applicant in applying for the issuance of the grant of the letters of administration to state in the inventory, the assets as being the 'action to claim for "temuda"/native customary rights' on the lands. After all there was no dispute that the applicants herein were and are the beneficiaries of the estate of the deceased.

Accordingly for the foregoing reasons, I granted prayer (1) of the applicants' application as stated in encl 9. By way of correction the date of the letter should be 24 July 1995 and not 24 June 1995 as stated in encl 9.

ISSUE 2

The contentions

On this issue I have already outlined hereinabove the points raised by En Abdul Rahman in opposing the application.

Meanwhile, in submitting for the applicants, learned counsel contended that under the Ordinance the task of the respondent as a Probate Officer should be divided into two stages, namely:

(1) to decide whether an applicant is eligible or qualified for the grant of the letters of administration; and

(2) if so and when s 5 of the Ordinance has been satisfied, to issue the letters of administration.

It was argued that only stage (1) provided the respondent with a discretion in view of s 9 of the Ordinance. Otherwise, once an applicant is entitled to the letters of administration under s 8 of the Ordinance and s 9 has not been invoked, and the necessary affidavit and inventory have been filed and estate duty, if any, paid, the respondent must grant the application. Learned counsel also submitted that s 3 of the Ordinance did not give the discretion to the respondent although the word 'may' appeared therein. The reason given was due to the phrase 'at his discretion' appearing in the subsequent paragraphs (b) and (c) of the said section.

Learned counsel also added that the Ordinance provided no power to the respondent to decide what constituted the estate of a deceased person.

As regards s 44 of the Act, learned counsel for the applicants conceded the five cumulative conditions to be satisfied. He submitted that in this case all the conditions were satisfied, inter alia:

(1) that the applicants, being the heirs of the deceased, have the legal right and are entitled to the grant of the letters of administration by virtue of s 8 of the Ordinance; and s 9 was not invoked. Furthermore

A the relevant affidavit and inventory were filed pursuant to s 5 of the Ordinance with no estate duty or stamp duty payable;

(2) it is in the interest of justice to allow the application for an order of mandamus because without the grant of the letters of administration the applicants would not be able to proceed with their action to claim
B native customary rights on the lands;

(3) there is no other legal remedy available to the applicants; and

(4) the remedy sought would be complete, ie upon issuance of the grant of the letters of administration.

C In respect of s 44(2)(b) of the Act, learned counsel submitted that it should not operate as a bar to the application since the applicants are not applying to enforce the satisfaction of a claim against the government.

The finding

For convenience it is appropriate to reproduce the relevant sections of the
D Ordinance, namely ss 3, 5, 8 and 9:

3 The Probate Officer may:

(a) issue probate and letters of administration of the estates of deceased persons leaving assets within his district;

(b) at his discretion take possession of and administer any asset within
E his district belonging to a deceased person in the event of there being no person competent or willing to administer the same;

(c) at his discretion administer any estate which appears to be insolvent.

5 A grant of probate or letters of administration shall not be issued until:

(a) an affidavit and inventory in the prescribed form of all the property,
F assets and effects (not exempted under subsection (1) of s 4) of the deceased in, or recoverable in, the colony, including all outstanding book and other debts due and owing to the deceased, has been sworn by the applicant; and

(b) the proper estate duty thereon has been paid.

G 8 The following persons, if of full age and of sound mind, are entitled in the order stated to letters of administration to a deceased person's estate:

(a) the deceased's widower;

(b) the male heirs of the deceased;

H (c) the deceased's father;

(d) the brother or brothers of the whole blood of the deceased;

(e) the deceased's widow (or primary widow if more than one);

(f) the deceased's nearest male relative;

(g) the deceased's nearest female relative;

I (h) any creditor of the deceased, who shall enter into a bond for such amount and with such sureties, or has furnished such security, as the Probate Officer shall require.'

9 (1) If, in the opinion of the Probate Officer, the person or persons entitled to probate or letters of administration is or are unfit to act,

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> he may issue the grant to the person or persons next entitled, or to any suitable person or persons who may be willing to act.
>
> (2) The Probate Officer may in his discretion require any person, besides a creditor of the deceased, applying for probate or letters of administration to enter into a bond or to furnish security as in the case of a creditor.

B

Basically, the thrust of the argument of En Abdul Rahman in opposing the application for an order of mandamus was that s 3(a) of the Ordinance was not satisfied. In his view there were no assets left within the district. Unfortunately he could not give any clear definition of the word 'assets' used in the Ordinance. But one thing was clear in my mind and that is the first applicant was referring to 'chose in action' when it was stated in the inventory as 'action to claim for "temuda"/native customary rights in the following lands ...'. The word 'assets' in s 3(a) of the Ordinance should not be confined to mean tangible properties such as land, money, etc. In fact the word is so loosely used that under s 17 of the Ordinance it is used alongside the words 'property' and 'effects'. If the view of En Abdul Rahman on the meaning of the word 'assets' is to prevail, then beneficiaries of estates of victims in personal injury cases dying intestate would not be able to pursue their claims against the tortfeasors as they would not be able to do so without the grant of the letters of administration (see *Ong Ah Ngim v Lau Kiok Kia* [1956] SCR 7).

C

D

E

Indeed, in the case of *King Hock Ching v Ung Siew Ping* [1974] 2 MLJ 16, a Sarawak case which also dealt with the Ordinance, his Lordship Tan Chiaw Thong J found that the word 'asset' was no-where defined in the Ordinance but nevertheless held that a right to sue being a chose in action was an asset in Sarawak. His Lordship went on to say thus at p 19C–E:

F

> In this connection, the point for consideration is whether a right to bring this action is an 'asset' of the estate of the deceased person concerned. If so, then this right is an asset of the deceased in Sarawak. In this connection, in the case of *Ong Ah Ngim v Lau Kiok Kia* [1956] SCR 7, it was held by the then High Court at Kuching that the right of action is part of the assets of a deceased's estate and that before a plaintiff can bring an action in pursuance of this right, it must have been vested in him. In that case, it was held, inter alia, that the right of action to sue for damages must be included in a grant of letters of administration before it could be enforced by an administrator. This part of the decision in that case turns upon the construction of the relevant provisions of the Ordinance which have not been amended up to now. With respect, I agree with the decision of the then High Court.

G

H

Similarly, I have no reason to differ.

And in another case of *Re Hee Chun Meng* [1989] 2 MLJ 310 his Lordship Shankar J (as he then was) rejected the submission that 'a chose in action is a thing apart and does not constitute either moveable or immoveable property'. Of course in that case the word 'estate' under s 2 of the Probate and Administration Act 1959 included a thing in action.

I

Hence, I found no merit in the contention of En Abdul Rahman that there was no evidence of assets left within the district. The first applicant filed the affidavit affirmed on 29 March 1990 and the inventory with the

particulars given therein and that should be sufficient. If at all it is necessary to go further, the affidavit of the first applicant (encl 17) which was unrebutted, should, in my view, provide the answer. Accordingly, it could not be said that the first applicant did not have the locus standi to apply. Furthermore, there was no denial that the first applicant was and is an heir of the deceased and thus should come within the ambit of s 8 of the Ordinance.

As to the contention that the act required to be performed is not clear, with respect, I do not think it has any merit as well. All that the applicants want is for the respondent to issue the grant of the letters of administration so that they can pursue the action to claim for 'temuda'/native customary rights on the lands. If that is not clear enough then I have not understood what En Abdul Rahman meant. Obviously there could have been a confusion in his mind as between the application for the issue of the grant of the letters of administration and the intended action of the applicants for 'temuda'/native customary rights. But the two should not be inter-meddled. The alleged controversy which might be related to the lands should only be considered after the applicants have commenced their action to claim for the 'temuda'/native customary rights but not before.

In respect of the five requirements of s 44(1) of the Act, I agreed with learned counsel for the applicants that they were duly satisfied. The injustice that would be caused is obvious if the grant of the letters of administration is not issued; and the applicants are only requesting for it so that they can pursue the claim for 'temuda'/native customary rights. But the respondent is refusing not because the provisions of the Ordinance have not been complied with, but for other reasons which should not have been his concern as a Probate Officer. In fact, the respondent at no time stated that he refused the grant in the exercise of his discretion. In short, it was quite obvious to me that in issuing the letter of 24 July 1995 it was not the state of the application that was considered but rather the perceived action that might follow. In my view that could not be right within the context of the Ordinance.

And that finally brings me to deal with the application of the first applicant as presented to the respondent in relation to the relevant provisions of the Ordinance and whether the order of mandamus should be issued.

First and foremost, it is necessary for an applicant of the grant of the letters of administration to be within the category as stipulated by s 8 of the Ordinance. In this case the first applicant, being the male heir of the deceased and duly authorized by the other heirs, has clearly met that provision. And in the absence of any opinion of the respondent as to his fitness to act which is provided under s 9, the first applicant remains entitled to the grant of the letters of administration to administer the deceased's estate.

Having satisfied the initial requirement, an applicant must comply with s 5 of the Ordinance. In the present case there was no dispute that such compliance was done, and that therefore leads to s 3 of the Ordinance.

En Abdul Rahman in his submission did not contend that the decision of the respondent was a pure exercise of discretion under s 3. In my view he could not have succeeded if he did. Although s 3(a) uses the word 'may' I do not think such a word entitles the respondent to decide in any way he so wishes. His decision must be consistent with the provisions of the Ordinance and the intention of the legislature as may be found therein. If an applicant therefore has complied with all the requirements as provided for under the Ordinance, then the respondent, not having invoked s 9, has no alternative but to grant the application (see *Tan Hee Lock v Commissioner for Federal Capital & Ors* [1973] 1 MLJ 238). Of course in so doing the respondent would have to consider, inter alia, whether the assets left are within his district. If it is obvious that there are no assets within the district as may be seen from the affidavit and inventory, then the application should be refused; and for that reason it is not absolutely correct to say that the word 'may' in that section should be construed as mandatory. In the present case, in view of my earlier finding, all the requirements have been satisfied.

For the foregoing reasons I found no basis for the respondent not to issue the grant of the letters of administration to the first applicant. And as such I granted prayer (2) of encl 9 to the applicants as well.

I did consider whether the application of the first applicant should be left for the respondent to review after granting the order of certiorari. But after considering the provisions of the Ordinance, the application of the first applicant as exhibited in his affidavit (encl 2), the other materials as presented before me and the submissions of learned counsel for the parties, I found it unnecessary to do so for the reasons as given hereinabove.

OTHER ISSUES

En Abdul Rahman also brought up s 202 of the Land Code while learned counsel for the applicants referred to s 23 of the Sarawak Limitation Ordinance. As the matter only dealt with the application for the issue of the grant of letters of administration and not the actual claim of the applicants for 'temuda'/native customary rights on the lands, I did not think such an issue was relevant nor was it necessary for me to considerthe issue in coming to my decision.

CONCLUSION

For the above reasons that I granted prayers (1) and (2) of encl 9 with costs to the applicants to be taxed unless agreed.

Application allowed.

Reported by T Vimalavathy